Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-625

In The

Supreme Court of the United States

October Term, 1996

JACK L. DOAN,

Petitioner,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Petitioners,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

MARK EDGAR HAMMONS
Counsel of Record
Attorney for Petitioners
401 North Hudson, Lower Level
Oklahoma City, Oklahoma 73102
(405) 235-6100

9739
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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STATEMENT OF FACTS

Contrary to Respondent's suggestion, Petitioners presented substantial evidence of discrimination and the Tenth Circuit's opinion can only be understood as a complete reweighing of relevant evidence.

Respondent claimed Mr. Doan was terminated because he was the lowest performer in his group, but the salary planning rankings created just weeks prior to the RIF showed Doan performing at a higher level than five much younger employees who were retained. Respondent had earlier sworn that no "different criteria [are] used for the salary planning purposes as compared to a ranking for, say, reduction in force purposes". App. Vol. II, pp. 114-15, 119-20, 122-23; Vol. III, p. 287. It was admitted that the ranking was in order of performance, App. Vol. II, pp. 61, 63, and that Doan's supervisor had the opportunity to observe the new employees and rank them higher if that had been warranted. App. Vol. II, p. 64. Though Respondent claimed Doan had serious performance problems, the written performance appraisals showed Doan had consistently improved in all areas and, just weeks prior to the RIF, Doan was rated satisfactory or better in every aspect of his performance. App. Vol. III, pp. 362-68; Def's Exh. 1-3, pp. 536-550. When Respondent's representative was asked if there were any documents to show Doan performing at a lower level than any younger, retained employees, he answered: "No, there's not" and "Only in my mind." App. Vol. II, pp. 69-70.

Further, Doan's immediate supervisor — the person who also made the RIF selections — testified that he was unaware of the age difference between Doan (age 59) and the five other lower ranked employees (aged 27 to 36) who he also supervised. App. Vol. III, p. 386, lines 14-17; p. 514, Plf's Exh. 4. This and other inconsistencies fully justified the jury's disbelief of Respondent's testimony.

As to Petitioners Furr, Woosley and Ozinga, Respondent admitted that it used undocumented and unrecorded criteria to select persons for termination, App. Vol. III, pp. 538-539. Petitioners refuted the oral reasons by pointing to documents created weeks before the RIF showing that younger persons were retained who were ranked, under the RIF criteria, as less valuable. App. Vol. II, pp. 81-85; Vol. IV, pp. 624, 638, 641, 788. Contrary to the statement in the circuit's opinion, the jury heard evidence that "elimination of positions" and overall value was encompassed in these rankings. App. Vol. II, pp. 81, 84; App. Vol. IV, pp. 624, 638, 641 & 788.

Petitioners also showed that their three managers each had ranked his subordinates in order of age always favoring youth: Sedlacek ranked his three youngest managers ranked highest; the two oldest ranked lowest. App. Vol. IV, pp. 742-43. Diffin ranked his five managers ranked in exact order of age; youngest ranked highest and oldest lowest. App. Vol. IV, pp. 620-21, 624; App. Vol. V 971, Plfs' Trial Exh. 21. West ranked his two directors and three managers in exact age order; youngest ranked highest and oldest lowest. App. Vol. IV, pp. 682-84.

Petitioners also showed that although the reduction was supposed to be 15% across-the-board, App. Vol. IV, p. 717, eight groups — approximately 1/3 of the employees in Petitioners' department — lost no one in the RIF. These groups were comprised predominately of younger employees. Three of the groups had no employees under age 40 and there were 15 new hires in those groups. App. Vol. IV, p. 614, line 21 to p. 615, line 12. No document existed to show why the groups of young employees were excluded from the RIF. App. Vol. IV, p. 744, lines 6-17. Additionally young, low performing employees were allowed to transfer into new positions to protect them from termination. App. Vol. IV, p. 746.

This is, of course, only a sample of the evidence Petitioners presented which amply supported the jury's verdict.

FURTHER REASONS FOR GRANTING THE WRIT

Four questions are presented warranting the review of this Court:

1. Whether a jury's disbelief of an employer's uncorroborated explanation for its employment action is sufficient to sustain the jury's finding of discrimination.

Respondent claims there is no clear conflict between the circuits on this issue, but a circuit need not expressly acknowledge a conflict for review to be proper. The question is whether the application of one circuit's legal standard would result in a different outcome than if the standard of another circuit was applied.

Respondent's proffered explanation for the termination of Petitioners was purely oral. Had the principle utilized by the Fifth Circuit been applied here, the jury verdict would have been affirmed because where "there is no supporting documentation, a jury can reasonably infer pretext". *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1195 (5th Cir.1992).

When the effect of applying differing legal standards is to make the outcome of a case dependent on which circuit hears the matter, there is a conflict of sufficient importance to warrant review. *See, e.g., United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985) (decision reviewed "appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 733, 734 (1985) (decisions "appeared to conflict in principle"), and *Barrett v. United States*, 423 U.S. 212, 215

(1976) (decisions "appeared to have overtones of conflict" between circuits).

Respondent's argument that there is no conflict also misses the mark in failing to understand the issue. The legal principle is this: When an employer's explanation is purely oral, rejection of that explanation is enough to sustain a plaintiff's verdict.

Of course there are situations where testimony goes to verifiable facts such that the failure to refute the testimony amounts to a concession of the facts. Here, however, the testimony goes to subjective state of mind, a matter not independently verifiable absent objective records or documents which this employer did not produce. Implicit in *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3, 717 (1983) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1973) is that it is the jury's function — not that of the court — to make this decision.

Review is proper to ensure conformance with *Aikens* and *Burdine* in that the circuit holding "seem[s] to be out of line with the authorities", *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129, 130 (1959) and "appear[s] to be in conflict with [this Court's] precedents". *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982).

Respondent's authorities do not diminish the importance of certiorari in this case and, in fact, highlight the error of the Tenth Circuit's decision. For instance in *United States v. Generes*, 405 U.S. 93, 106-107 (1972) this Court granted judgment on the basis that the taxpayer's self-serving testimony as to his motive which was contradicted by other evidence was insufficient to create a triable issue. Holding that self-serving and inconsistent testimony need not be credited is the polar opposite of the Tenth Circuit's characterization of such testimony as "uncontroverted".

2. Whether the *McDonnell Douglas* indirect method of proof applies in a lay-off setting to require the employer to explain why certain groups of employees are included in the reduction while others are excluded.

Respondent concedes there is a real and substantial split between the circuits as to how the *McDonnell Douglas* indirect method of proof applies in a RIF. Review is proper because "this conflict involves an important question of statutory construction", *Shapiro v. United States*, 381 U.S. 311, 314 (1965), and there is "the need for a uniform rule on the point". *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).

Respondent argues that because it conceded a *prima facie* case Petitioners could not have been injured by application of the wrong standard. This concession did not cure the error of the Tenth Circuit in *applying* the wrong analysis of who bears the burden of production.

As pointed out in their initial petition, knowing which factual elements make up the *prima facie* case is critical to a correct decision. Absent a sufficient explanation by the employer, a jury which "finds that the prima facie case is supported by a preponderance of the evidence . . . *must* . . . render a verdict for the plaintiff." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 n. 3 (1993) (emphasis by the Court). The facts making up the prima facie case coupled with "disbelief of the reasons put forward by the defendant [may] suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511.

The Tenth Circuit required Petitioners to eliminate all possible legitimate reasons for the exclusion of young employees from the RIF even though the employer had not itself articulated an explanation. *Furr*, 82 F.3d at 987. Indeed, the Circuit speculated that "the fact that some departments were unaffected

may be the natural consequence of the greater perceived importance of certain departments." *Id.*, emphasis supplied.

This approach is contrary to the standard used in the Third and Seventh Circuits which requires the employer to explain why certain employees are made subject to a RIF while other employees are not. "[A]n employer that releases a protected employee while [retaining] younger employees [must] explain its actions without forcing the protected employee to uncover the elusive 'smoking gun.' " *Oxman v. WLS-TV*, 846 F.2d 448, 455-56 (7th Cir.1988). *Accord Marzano v. Computer Science Corp.*, 91 F.3d 497, 508-511 (3d Cir.1996). Had the Seventh Circuit approach been followed, the outcome would have been different because the Respondent would not have met its burden of refuting the *prima facie* case.

Respondent argues that the Tenth Circuit already follows the rules utilized by the Third and Seventh Circuits, but ignores the fact that *Furr* stands in direct conflict with prior Tenth Circuit precedent. In *Bell v. AT&T*, 946 F.2d 1507, 1511 (10th Cir.1991) the circuit held that in cases "involving a reduction-in-force, the employer must assert a legitimate justification for leaving certain employees out of the group susceptible to termination while including others." *Bell* also held that it was reversible error for a court to supply its own reason for an employer's action when the employer itself had failed to offer a reason. *Id.*, 946 F.2d at 1514. *Furr* thus created an intracircuit conflict which further justifies certiorari. *See Scarborough v. United States*, 431 U.S. 563, 567 n. 4 (1977); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939), and *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950).

3. Whether jury verdicts in employment discrimination cases are entitled to the same deference afforded jury verdicts in FELA/ Jones Act cases.

Respondent argues that this matter was not preserved because *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) was not cited to the circuit. At the trial level JMOL was denied, and on appeal Petitioners showed that the jury's verdict was amply supported such that under any standard JMOL was inappropriate.

Regardless of the standard used, the evidence was sufficient to sustain the jury's verdict. The importance of preserving the jury's function in ADEA cases is sufficient to warrant summary reversal by this Court. *See Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (review granted "because of the importance of preserving for litigants in FELA cases their right to a jury trial."). Justice Douglas noted that prior decisions of the Supreme Court and appellate courts had frustrated the congressional mandate that juries should determine liability in FELA cases. That same congressional mandate exists in ADEA cases where jury trials were provided because a "jury may be more neutral" and "more likely to be open to issues raised by plaintiffs" than a judge. 123 Cong.Rec. 34318 (1977). As in *Wilkerson*, "a decision not to correct [the decision] [i]s to let the administration of the law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation." *Id.*, 336 U.S. at 69 (Douglas, J., concurring). "The criterion governing the exercise of our discretion in granting or denying certiorari is . . . whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been respected". *Id.*, 336 U.S. at 70-71.

This presents an appropriate context for this Court to determine the correct JMOL standard. Petitioners' assertion that

JMOL was inappropriate requires determination of the correct standard. The failure to specify the *Lavender* (FELA) standard is not an absolute barrier to considering the issue. *Cf., Singleton v. Wulff*, 428 U.S. 106, 121 (1976) and *Hormel v. Helvering*, 312 U.S. 552, 557 (1940) (question may be reached when "injustice might otherwise result.").

Of course it was impossible to anticipate the need to raise the *Lavender* (FELA) JMOL standard because Petitioners could not anticipate that the Circuit would ignore its own precedent regarding the admissibility and weight to be accorded Petitioners' evidence.

Nor is Respondent correct in arguing that the applicable JMOL standard has been determined by this Court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) did not address the FELA and Jones Act decisions nor purport to overrule them. Thus, as noted in 9A Wright & Miller, *Federal Civil Procedure, Civil 2d*: § 2526, pg 282, two distinct JMOL standards currently exist and reconciliation "would be of helpful guidance to the lower federal courts."

4. Whether denial of a post-JMOL motion for new trial by an appellate court is such a drastic measure that respect for the jury's function under the Seventh Amendment requires that such action be summarily reversed absent a statement of the basis for that denial.

Respondent argues that this Court has already decided that a court of appeals need not set out the reasons for entering JMOL in lieu of remanding for a new trial citing to *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967). In *Neely*, 386 U.S. at 329-330, the plaintiff had never moved for a new trial in lieu of JMOL. Despite this failure, this Court held that "it would have been better had [the Court of Appeals'] opinion expressly dealt with the new trial question." *Id.*

Here, Petitioners expressly moved for new trial in their Petitions for Rehearing but the circuit without explanation denied such request. The question is whether, when presented with a specific request and specific factors justifying a new trial in lieu of JMOL, a court of appeals should be required to articulate the basis for its decision. Denying the request for an alternative new trial substantially impairs the right to trial by jury; a matter sufficiently important to warrant review by this Court. *Wilkerson, supra*, 336 U.S. at 55 (certiorari granted "because of the importance of preserving for litigants in FELA cases their right to a jury trial."). *Accord Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959) (diversity, negligence suit); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956) (diversity, insurance claim) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (non-jury trial of an "equity" issue in a civil antitrust case).

The ADEA shares with FELA the same congressional mandate that juries be allowed to decide the issues. Because JMOL subverts both the Seventh Amendment and the congressional mandate that ADEA issues are to be decided by a jury, entry of JMOL should be carefully circumscribed. This can only be accomplished by requiring courts to articulate the reasons why a new trial is not granted at least in cases where the plaintiff makes a timely Rule 50(d) motion.

CONCLUSION

Petitioners pray that this Court grant certiorari to the Tenth Circuit of the United States Court of Appeals.

Respectfully submitted,

MARK EDGAR HAMMONS
Counsel of Record
Attorney for Petitioners
401 North Hudson, Lower Level
Oklahoma City, Oklahoma 73102
(405) 235-6100